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Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

APOLLO RESOURCES, INC. d/b/a APOLLO SERVICES, INC.,

Petitioner,

v.

QBE INTERNATIONAL INSURANCE, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the application of state law, which requires Fact Pleading in liability insurance coverage determination, violative of the Notice Pleading concept embodied in Rule 8(a) of the Federal Rules of Civil Procedure, and in conflict with the United States Supreme Court and federal appellate court decisions which hold that Notice Pleading in a federal lawsuit takes precedence over state law Fact Pleading requirements?

2. Is the decision of the Fifth Circuit Court of Appeals which held that liability insurance coverage determination is governed solely by an "Eight Corners" review (i.e., the "four corners" of the Complaint as compared against the "four corners" of the insurance policy) in conflict with the United States Supreme Court and federal appellate court decisions in which only Notice Pleading is required in a federal case?

3. Is the decision of the Fifth Circuit Court of Appeals, which held that no coverage was triggered in a liability insurance policy because there were no specific allegations of employment-related misrepresentations set forth in the Complaint, in conflict with the prior decision of the Fifth Circuit Court of Appeals which, on appeal from the judgment and the principal claim in this case, specifically held that the issue of misrepresentation in employment practice was correctly decided by the district court?

4. Is the decision by the Fifth Circuit Court of Appeals, which held that the insured had no right of reimbursement for cost of defense under the insurer's indemnity obligation of the insurance policy, in conflict with decisions of the federal appellate courts in the Third, Ninth and Eleventh Circuits?

STATEMENT PURSUANT TO RULE 29.6

Apollo Resources, Inc. d/b/a Apollo Services is wholly owned by Baker Hughes Oilfield Operations, Inc., a subsidiary of Baker Hughes, Inc. (a publicly traded company).

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Petitioner, Apollo Resources, Inc. d/b/a Apollo Services, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Plaintiffs, former employees of Apollo Resources, Inc. (hereafter referred to as "Apollo"), filed suit against Apollo under the Fair Labor Standards Act, 29 U.S.C. § 209, *et seq.*, the Louisiana Wage Statute (La. R.S. 23:631-632) and general employment contract law (including employment-related misrepresentations). Apollo's employment practice liability insurance carrier, QBE International Insurance Limited (hereafter referred to as "QBE Insurer"), refused to defend Apollo against plaintiffs' claims; therefore, Apollo filed a Third Party Demand against QBE Insurer which, in the course of the litigation, was severed by the district court from the trial of the principal claim.

The United States District Court for the Western District of Louisiana, with the Honorable Richard T. Haik presiding, after the trial of the claims of six of the Plaintiffs, ruled in favor of Apollo and entered a judgment on March 9, 1999. Plaintiffs thereafter appealed to the United States Fifth Circuit Court of Appeals and that court affirmed the district court's judgment in favor of Apollo. *See* 242 F.3d 629 (5th Cir. 2001), Appendix C.

Thereafter, cross motions for summary judgment were filed by the parties in the Third Party Claim (Apollo and QBE Insurer), the only issue of which at that point was for reimbursement of costs of defense incurred by Apollo (over $500,000 in fees and expenses). The federal district court judge granted judgment in favor of Apollo awarding the costs

of defense on October 25, 2001 and certified the judgment as final. QBE Insurer thereafter appealed that judgment to the Fifth Circuit Court of Appeals on January 28, 2002, which, on March 20, 2003, reversed the district court judgment. *See* Appendix A. Apollo applied for a rehearing en banc on April 14, 2003 and this was entered on April 29, 2003. This Petition for Writ of Certiorari was filed on July 28, 2003.

STATEMENT OF JURISDICTION

Subject matter jurisdiction for the United States District Court for the Western District of Louisiana on the principal claim was federal question jurisdiction pursuant to 28 U.S.C. § 1331. Subject matter jurisdiction of the Third Party Demand at the district court and appellate court levels was diversity of citizenship pursuant to 28 U.S.C. § 1332(a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Rules 8(a), 15(a) and 54(c) of the Federal Rules of Civil Procedure. These provisions are set forth in Appendix E.

STATEMENT OF THE CASE

The Facts

At all pertinent times hereto, Apollo was an oilfield service company based in Lafayette, Louisiana. Apollo sought and upon payment of a premium obtained a policy of Employment Practices Liability insurance from QBE Insurer for protection against possible employment practice litigation costs and losses.

Thereafter, Plaintiffs, former employees of Apollo, filed suit against Apollo for employment practices allegedly in violation of the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*), the Louisiana Wage Statute (La. R.S. 23:631-632) and general employment contract law (including employment-related misrepresentations), in the United States District Court for the Western District of Louisiana. The case was assigned to Federal District Court Judge Richard T. Haik. Apollo made demand upon QBE Insurer, its Employment Practices Liability carrier, to provide the defense of the litigation. QBE Insurer refused, alleging that the Plaintiffs' Complaint did not set forth any employment practices that were covered by the policy. Thereafter, Apollo provided its own defense and filed a Third Party Demand against QBE Insurer. The Third Party Demand against QBE Insurer was severed from the trial of the main demand.

In connection with the trial of the main demand, a Pretrial Order was issued on February 4, 1999, specifically setting forth the parties' allegations, contentions of facts, issues of fact and issues of law. In the Pretrial Order, Plaintiffs specifically alleged, among other things, that "Defendants were willful in using and applying the fluctuating work week method" (paragraph D on page 4 of the Pretrial Order). Additionally, Plaintiffs specifically set forth in the issues of fact whether Apollo properly informed them of the details of the fluctuating work week method of payment (paragraphs B, C, D, E on page 19 of the Pretrial Order). As a contested issue of law, Plaintiffs included the issue of whether Apollo properly represented the fluctuating work week method of payment to the plaintiffs (page 33 of the Pretrial Order.)

This Pretrial Order governed the trial of the case. At the conclusion of the presentation of the claims of six of the

Plaintiffs, Federal District Court Judge Haik ruled in favor of Apollo, deciding the issues which had been presented in the Pretrial Order, including the issues of whether there were misrepresentations by Apollo in its discussion with the employees regarding the fluctuating work week method of payment and other employment-related issues. Judge Haik made the following findings of fact when discussing his decision to rule in favor of Apollo on a plaintiff-by-plaintiff basis: (a) "There was certainly no misrepresentation," (b) "Certainly there is no misrepresentation," (c) "And certainly there has been no proof of misrepresentation or anything of that nature," (d) "And there is certainly no misrepresentation in this case even possible under the testimony that this Court heard," and (e) "I find that there is no misrepresentation of any kind in any way, shape, or form."

The Plaintiffs in the principal demand appealed to the United States Fifth Circuit Court of Appeals, which affirmed Judge Haik's decision and specifically stated that included in the Plaintiffs' contentions were that: (a) "Apollo *misrepresented* the number of hours they would be called upon to work," (b) "Apollo *misrepresented* the number of hours," and (c) "Apollo made *misrepresentations* about comparable amounts of time off." [Emphasis added]. The Fifth Circuit noted that, "Plaintiffs argued that they could not have formed a clear understanding of the fluctuating work week method of payment as a matter of law given these *misrepresentations*." [Emphasis added]. The Fifth Circuit affirmed the district court's judgment in favor of Apollo, partly on the basis that there was no evidence of misrepresentations. It has been admitted throughout this case that employment practices of misrepresentation are covered by the policy of QBE Insurer.

After the affirmation by the Fifth Circuit of the district court's judgment in favor of Apollo, Apollo filed a Motion for Partial Summary Judgment against QBE Insurer in the Third Party Demand to recover the defense costs which had been incurred by Apollo in the defense of the principal demand. QBE Insurer filed a cross Motion for Summary Judgment. The district court held that the Plaintiffs' allegations of misrepresentation triggered QBE Insurer's duty to defend, noted that QBE Insurer failed to do and ruled that defense costs were also owed under the indemnity "Loss" part of the policy. Accordingly, the district court awarded judgment in favor of Apollo with regard to the defense costs (exclusive of applicable deductibles under the policy). QBE Insurer appealed the Judgment to the Fifth Circuit Court of Appeals, which reversed the district court.

QBE Insurer's policy specifically covers "Employment related misrepresentations by an Insured." Plaintiffs allegations in the Pretrial Order set forth the factual basis on which the Plaintiffs argued misrepresentations at the trial of the principal demand. The district court addressed the contentions of misrepresentations and found no basis for them. The Fifth Circuit Court of Appeals addressed the issues of misrepresentation and affirmed the district court findings. (*See* Appendix C). Unquestionably, if any liability had been found on the part of Apollo for misrepresentations in its employment practices they would have been covered by the liability policy of QBE Insurer.

The second panel of the Fifth Circuit Court of Appeals, in reviewing the district court judgment on the Third Party Demand, held that since the Plaintiffs' original Complaint did not allege misrepresentations, there was no duty to defend and no duty to reimburse Apollo for defense costs.

This second panel of the Fifth Circuit Court of Appeals also denied Apollo's argument that it was owed the costs of defense as a "loss" under Part I of QBE Insurer's policy, since Part I of the policy required the insurer to pay those losses which the insured was legally obligated to pay. Apollo applied for rehearing *en banc*, but that application was denied.

BASIS FOR GRANTING WRIT OF CERTIORARI

I.

The narrow, factually specific requirement in the decision of the Fifth Circuit Court of Appeals is in conflict with:

A) The United States Supreme Court Federal Rule 8(a) of the Federal Rules of Civil Procedure with regard to Notice Pleading;

B) Decisions of the United States Supreme Court which reinforce the Notice Pleading concepts contained in the Federal Rules of Civil Procedure;

C) The Fifth Circuit Court of Appeals decision in the case of *Stone Petroleum Corp. v. Ins. Co. of North America*, 961 F.2d 90 (5th Cir. 1992), which applied the liberal rule of Notice Pleading of the federal system to determine whether there was a duty on the part of the insurer to defend a lawsuit; and

D) The decision reached by the first panel of the Fifth Circuit Court of Appeals on appeal of the Judgment in favor of Apollo regarding the principal demand.

II.

The decision of the Fifth Circuit Court of Appeals on the appeal of the Judgment in the Third Party Demand denying Apollo the reimbursement of defense costs under the indemnity provision of the policy is also in conflict with decisions involving the same issues out of the Third, Ninth and Eleventh Federal Circuits.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Preface

A Writ of Certiorari should be granted by this Court because the Fifth Circuit Court of Appeals decision is in conflict with the rules and decisions of the Supreme Court, in conflict with decisions of other federal appellate circuits, in conflict with the decision by the Fifth Circuit Court of Appeals in an unrelated matter and in conflict with the prior decision of the Fifth Circuit Court of Appeals in this case on the appeal of the Judgment in the principal demand.

A Writ of Certiorari should be granted by this Court because the subject matter at the nexus of this case is of paramount public importance, to-wit: the right of all liability insurance policy holders — from judges, to employers, to farm labors who insure their cars — to have an adjudication of insurance coverage determined on the merits of their cases, rather than on technicalities set forth in pleadings, has been put at risk. Billions of dollars are spent across the United States each year on premiums paid by the public to have protection for costs of litigation and from any losses that might be sustained as a result of any such litigation.

The Fifth Circuit Court of Appeals decision puts at risk an adjudication of the public's rights on whether or not the plaintiff's attorney, in drafting his or her Complaint, specifically alleges those issues within coverage, rather than on an adjudication based on the actuality of the merits of the claimed right by the insured. In short, the Fifth Circuit's decision allows the policyholder's adversary — through the fortuitous use or non-use of talismanic words in the paper captioned as the Complaint — to determine the policyholder's rights to the insurance protection afforded through payment of the premium under the policy purchased to protect the policyholder against just that sort of claim. The Fifth Circuit's decision has effectively imposed an improper "heightened pleading standard" that is not required by federal Notice Pleading.

Furthermore, a Writ of Certiorari should be granted because a federal question is involved, to-wit: the Fifth Circuit Court of Appeals has, in effect, ruled that state court substantive law can abrogate the Federal Rules of Civil Procedure which were created by this Court, ratified by the Congress and reinforced by United States Supreme Court decisions. The Fifth Circuit Court of Appeals held that the state law requiring the pleading of specificity of the facts and theories overrules the Notice Pleading of the federal system. The Rule that imposes Notice Pleading in the federal system was created by this Court to insure that justice is dispensed on actuality, not on technicality.

A. In Conflict with Rule 8(a) of the Federal Rules of Civil Procedure.

The United States Supreme Court, on December 20, 1937, ordered that the proposed Rules of Procedure for District Courts, which the Court co-authored, be adopted pursuant to Section 2 of the Act of June 19, 1934, and be transmitted to the Attorney General to report to Congress, which ultimately passed the law establishing those Rules.

Rule 8(a) provides that the pleading shall contain: (1) a short and plain statement of the jurisdiction; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief sought by the pleader. In contrast, the Fifth Circuit Court of Appeals held in this case that the specific allegations of the Complaint did not spell out within the "Eight Corners" the employment-related misrepresentation basis for coverage and that, therefore, the insurance company had no obligation to defend the case, despite the undeniable facts that employment-related misrepresentations are covered by the Employment Practices Liability policy, are implicit in the facts and issues set forth in the Pretrial Order and were, in fact, tried before the district court. The district court deliberated and decided the issues of misrepresentation and the Fifth Circuit Court of Appeals, on appeal from the judgment of the district court in favor of Apollo, affirmed the district court, deciding that the claims by Plaintiffs of misrepresentation by Apollo were correctly decided by the district court (Appendix C).

By requiring specificity in pleadings the Fifth Circuit Court of Appeals' decision violates Rule 8(a). The decision of the Fifth Circuit Court of Appeals is also violative of a spirit of liberality of pleadings as set forth in Rules 15(a) and 54(c) of the Federal Rules of Civil Procedure.

B. In Conflict with Decisions of the United States Supreme Court.

This Court has repeatedly reviewed the issue of Notice Pleading and has held that Notice Pleading is a crucial concept to ensure that issues are decided on merits and not on technicalities. There are two cases of note that stand out — one because it is the most recent pronouncement of this Court, and the other because this Court corrected the Fifth Circuit's attempt to restrict Notice Pleading.

In *Swierkiewicz v. Sorema, N.A.* 122 S. Ct. 992, 534 U.S. 506, 152 L. Ed. 2d 1 (2002), the issue was whether claims for racial discrimination and violations of Title VII and under the Age Discrimination and Employment Act had to define the claim with factual specificity to establish a *prima facie* case of discrimination. This Court reversed the Second Circuit's "heightened pleading standard" on the basis that Rule 8(a) simply requires that the Complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

In *Leatherman v. Tarrant County Narcotics Unit*, 113 S. Ct. 1160, 507 U.S. 163 (1993), the Fifth Circuit Court of Appeals attempted to apply a "heightened pleading standard" to a complaint for civil rights violations against a municipality. This Court reversed the Fifth Circuit Court of Appeals' decision stating as follows:

> We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the federal rules. Rule 8(a)(2) requires that a complaint include only

'a short and plain statement of the claim showing that the pleader is entitled to relief.'

The Fifth Circuit Court of Appeals in the case at bar applied a "heightened pleading standard" in violation of the principles set out in the cases cited above.

What further offends the sense of justice in this case is that the Fifth Circuit Court of Appeals held that there was insufficient specificity of coverage of misrepresentation practices in the complaint despite: (a) the fact that the Pretrial Order, which superceded the original Complaint, specifically sets forth facts on which to establish the theories of misrepresentation; (b) the district court addressed the issues of misrepresentation at trial and found them without factual support; and (c) the decision of the first panel of the Fifth Circuit Court of Appeals, on appeal from the original demand, specifically discussed misrepresentation and found that the district court was correct in determining that there was no misrepresentation proven by the Plaintiffs.

C. In Conflict with *Stone Petroleum Corp.*, 961 F.2d 90 (5th Cir. 1992).

In *Stone Petroleum Corp., supra*, the Fifth Circuit Court of Appeals recognized the distinction between the federal system of Notice Pleading and Louisiana law which requires factual specificity in determining whether there is an obligation to defend on the part of the insurer. Applying the federal Notice Pleading, thereby reversing the district court, the Fifth Circuit stated as follows on page 93:

> . . . [I]t fails to assign sufficient weight to the essential difference between the federal Notice Pleading Rule and the Louisiana fact pleading rubric. The strict application urged by INA taken to its natural conclusion, would jeopardize every insured's rights to a defense in federal court litigation merely because the action was initiated by a pure notice and not a fact pleading.

The Fifth Circuit Court of Appeals' decision in this case is in conflict with the *Stone Petroleum Corp.* case, which recognized the conflict between the Notice Pleading of Rule 8(a) and Louisiana law which requires specificity of pleadings to provide coverage to the insured for the defense of the litigation.

D. In Conflict with the Decision of the Fifth Circuit Court of Appeals on Appeal by Plaintiffs in the Original Demand.

After the trial of the principal demand by Plaintiffs against Apollo, Federal District Court Judge Haik considered and adjudicated the issues of alleged misrepresentation practices by Apollo and the Fifth Circuit Court of Appeals, on appeal from Judge Haik's decision in favor of Apollo, again considered and decided the alleged misrepresentation practices set forth in the Pretrial Order that governed the trial of the principal demand. In its decision, the Fifth Circuit Court of Appeals stated as follows:

> They [the plaintiffs] assert two points here. First, they claim that Apollo misrepresented the number of hours that the employees would be called upon to work, specifically, that Apollo made misrepresentations about comparable amounts of time off. . . . They [the plaintiffs] argued that they could not have formed a clear understanding of the FWW method as a matter of law given these misrepresentations.

[Bracketed text added for clarity.]

The Fifth Circuit Court of Appeals' decision which is before this Court held that misrepresentation practices were not alleged in the Complaint and therefore QBE insurer had no obligation to defend and no obligation to reimburse Apollo for the cost of defense. The present decision of the Fifth Circuit Court of Appeals disregarded the allegations in the Pretrial Order (which superseded the Complaint), disregarded Judge Haik's consideration and adjudication of the alleged

misrepresentation practices and disregarded the decision by the prior panel of the Fifth Circuit Court of Appeals on appeal from the principal demand, affirming that there were no misrepresentation practices by Apollo.

The Fifth Circuit Court of Appeals' decision which is in question also disregarded the Law of the Case doctrine, which holds that a prior decision of the same court should be followed on an issue preclusion basis. *Kapache v. City of San Antonio*, 304 F.3d 493 (5th Cir. 2002); *North Mississippi Communications, Inc. v. Jones*, 951 F.2d 652 (5th Cir. 1992).

E. The Decision is in Conflict with Decisions in Other Federal Appellate Circuits.

Federal District Court Judge Haik held that Apollo was entitled to recover the defense costs as a "loss" under the indemnity side of the policy. The Fifth Circuit Court of Appeals refused to consider this ruling.

The policy of QBE Insurer contains Parts I and II which set out the insured's obligations to its insured.

> Part I obligates the insurer to pay "loss" that the insureds are legally obligated to pay . . . for a Wrongful Employment Practice. . . . "Loss" is defined in III(J) as "money damages, settlements and defense costs."
>
> Part II provides that QBE Insurer has "the duty to defend all claims for a Wrongful Employment Practice" which includes "Employment-related misrepresentation by an insured; . . . ."

Federal District Court Judge Haik ruled and Apollo submitted to the Fifth Circuit Court of Appeals that QBE Insurer was obligated to pay the "loss" which included "defense costs," irrespective of whether QBE insurer has the duty to defend the action. The Fifth Circuit Court of Appeals refused to consider this basis for Apollo's reimbursement of defense costs, said refusal which is contrary to the following Federal Circuit Court of Appeals decisions:

1. *Gon v. First State Ins. Co.*, 871 F.2d 863 (9th Cir. 1989) in which the insurance policy provided no duty to defend on the part of the insurer; the policy did provide that the insurer was to pay for the loss sustained by the insured including the cost of defense. The Ninth Circuit Court of Appeals held that the absence of a duty on the part of the insurer to defend a claim was superfluous since the insurer was obligated to pay the cost of defense under the concept of "loss."

2. *Okada v. MGIC Indem. Corp.*, 823 F.2d 276 (9th Cir. 1987);

3. *Little v. MGIC Indem. Corp.*, 836 F.2d 789 (3d Cir. 1987); and

4. *National Union Fire Ins. Co. of Pittsburgh, PA v. Brown*, 787 F. Supp. 1424 (S.D. Fla. 1991), *affirmed without opinion*, 963 F.2d 385 (11th Cir. 1992).

These Federal Circuit Appellate Courts held that the obligation of the insurer to reimburse the insured for the "loss" ~~sus~~tained in the cost of defending the lawsuit is completely independent from the duty of the insured to

defend the litigation. Stated another way, where the insurer has no duty to defend and its policy covers cost of defense as an element of "loss," the insurer has the obligation to reimburse its insured for those expenses. The Fifth Circuit Court of Appeals, in conflict with those federal appellate circuits, refused the claim by Apollo to be reimbursed for the cost of defense under Part I of the policy which requires that QBE Insurer pay the cost of defense as an element of "loss" under Part I.

CONCLUSION

It is respectfully requested that a Writ of Certiorari be granted for the following reasons:

A. The decision of the Fifth Circuit Court of Appeals, applying a "heightened pleading standard" that required specificity in the Complaint as a prerequisite to finding coverage, is violative of and inimical to Paragraph 1, the Orders of this Court, specifically Rule 8(a) as reinforced by Rules 15(a) and 54(c) of the Federal Rules of Civil Procedure and the decisions of the United States Supreme Court which reinforce the letter and the spirit of Rule 8(a) to safeguard against deprivation of rights by technicalities in the drafting of the Complaint.

B. The decision of the Fifth Circuit Court of Appeals is in conflict with *Stone Petroleum Corp. v. Ins. Co. of North America, supra*, which applied Notice Pleading of the Federal Rules over the Louisiana law requiring Fact Pleadings.

C. The Fifth Circuit Court of Appeals' decision that refused to allow reimbursement for cost of defense under Paragraph I of the Employment Practices Liability policy,

which obligates the insurer to pay the insured's loss, including cost of defense, is in conflict with federal appellate decisions in the Third, Ninth and Eleventh Federal Circuits.

D. Of public and paramount importance is the basic subject which is at the heart of this litigation and which is how to ensure that the millions of policyholders in this country who pay billions of dollars in premiums for protection against litigation, be given an opportunity to present their rights without being restricted on how the Complaint is fortuitously drafted by the plaintiff's lawyer.

E. The federal law issue of whether state laws which require specificity of pleadings to determine coverage and obligation to defend is in violation of the Notice Pleading set forth by this Court in its orders and decisions at the core of cases reported in the West Federal Practice Digest under Insurance, Key Numbers 2913 and 2914, where the federal courts in various circuits have reached a variety of results on the basis of the particular state law requirements of specificity in pleadings. This, in effect, becomes a "heightened pleading standard" that is inimical to the Notice Pleading embodied in Rule 8 and the liberality of the amendment of pleadings to conform to the evidence as set forth in Rules 15(b) and 54(c) of the Federal Rules of Civil Procedure.

It is, therefore, necessary that a Writ of Certiorari be granted so that this Court can resolve the issue of whether Notice Pleading should prevail over state laws that require specificity of pleadings to provide coverage to the insured.

Respectfully submitted,

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